

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 050541-02**

John Fera  
Massachusetts Turnpike Authority  
Massachusetts Turnpike Authority

Employee  
Employer  
Self-insurer

**REVIEWING BOARD DECISION**  
(Judges Horan, McCarthy & Fabricant<sup>1</sup>)

**APPEARANCES**

Michael C. Akashian, Esq., for the employee  
Clyde B. Kelton, Esq., for the self-insurer

**HORAN, J.** The self-insurer appeals from a decision awarding the employee § 35 benefits, in part over a period of previously ordered and paid § 34 benefits, and denying the self-insurer the right to recoup any resulting overpayment. We reverse the decision on the recoupment issue.

We summarize the pertinent findings of fact. The employee suffered a closed head injury at work on September 5, 2002. He was paid § 34 benefits from the date of injury until June 3, 2004, when he returned to modified work. On the advice of his doctor, he left work again on June 10, 2005. The employee then filed a claim for § 34 benefits, and a conference order issued requiring the self-insurer to pay § 34 benefits from June 10, 2005, to date and continuing. The self-insurer appealed. (Dec. 728-730.)

In his hearing decision filed on January 9, 2007, the judge adopted the opinion of Dr. Michael Rater, contained in his September 5, 2005 report, that the employee had a partial disability. (Dec. 735.) The judge also found the employee was capable of “competitive racquetball play,” and assigned him an earning capacity of \$232.33 effective September 5, 2005. (Dec. 735-736.) This resulted in an award of § 35 benefits at \$419.18 per week, based on an average weekly

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<sup>1</sup> Judge Fabricant recused himself and did not participate in panel deliberations.

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wage of \$931.51; it also resulted in an overpayment of weekly benefits. (Dec. 736.) The judge then ordered “[t]hat no recoupment of any overpayment in this case be paid to the self insurer.” (Dec. 737.)

The self-insurer appeals only on the issue of recoupment. It argues the judge exceeded his authority by denying its recoupment right as set forth in the first sentence of G. L. c. 152, § 11D(3), which provides:

An insurer that has paid compensation pursuant to a conference order, shall, upon receipt of a decision of an administrative judge or a court of the commonwealth which indicates that overpayments have been made be entitled to recover such overpayments by unilateral reduction of weekly benefits, by no more than thirty percent per week, of any remaining compensation owed the employee.

The self-insurer is correct that we have previously addressed this issue in Rohrbacher v. AMA Fabricators, 11 Mass. Workers’ Comp. Rep. 317 (1997). The material facts of this case are sufficiently identical to those in Rohrbacher where, in a hearing decision, “an administrative judge reduced the employee’s weekly benefits below the amount he ordered at the § 10A conference.” Id. In Rohrbacher, the judge erred by limiting the insurer’s right to recoupment to less than the thirty percent authorized by statute. We reversed the decision “[b]ecause the judge did not have the discretion to limit the insurer’s unilateral right to a thirty percent recoupment. . . .” Id. The plain meaning of the statute governs here, as in Rohrbacher. See also Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers’ Comp. Rep. 209, 216 n.5 (2001); Sylvester v. Town of Brookline, 12 Mass. Workers’ Comp. Rep. 227, 232 (1998).

On these facts, the judge’s decision to deny the self-insurer any right of recoupment under the statute is beyond the scope of his authority and contrary to law. Accordingly, if it is still paying weekly incapacity benefits, the self-insurer is authorized to reduce said payments to the employee by up to thirty percent until its

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overpayment is recouped. The self-insurer's right to seek recoupment under the second sentence of § 11D(3) is hereby preserved.<sup>2</sup>

So ordered.

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Mark D. Horan  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

Filed: November 29, 2007

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<sup>2</sup> The second sentence of G. L. c. 152, § 11D(3), provides:

Where overpayments have been made that cannot be recovered in this manner, recoupment may be ordered pursuant to the filing of a complaint pursuant to section ten or by bringing an action against the employee in superior court.